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A NEW PROVINCE FOR LAW AND ORDER.—III

READERS of the HARVARD LAW REVIEW who have perused the two previous articles[1] under this heading (November, 1915; January, 1919) may be interested in reading of the more recent developments of the Commonwealth Court of Conciliation and Arbitration in Australia.

There are three main aspects in which the results of such an experiment may be considered: (1) how far continuity of industrial operations is secured; (2) how far the conditions of the workers have been improved; and (3) how far the use of human life for industrial processes has been reduced to system and standardised. The first aspect appeals mainly to the employing class; the second to the employees; the third to those who study the development of law and order in human relations. All three aspects concern the whole community.

(1) Never has there been such industrial unrest as at present throughout the world. Owing to causes which I need not stay to consider, the cost of living everywhere has risen during the Great War; and it is still rising. There is a shortage of commodities; the demand for labour has increased, and much exceeds the supply; the strategic position of the class who take employment is temporarily superior to that of the class who give employment. Vague and ill considered proposals for the immediate introduction of a new social order have been spread abroad, and in remote Australia as well as

[1] "A New Province for Law and Order," I, 29 HARV. L. REV. 13; "A New Province for Law and Order," II, 32 HARV. L. REV. 189.

elsewhere. In the whirling confusion of the times how far has this Court aided in securing the continuity of industrial operations? For the answer to this question we are largely indebted to a rash speech made by a federal Minister some twelve months ago. Possibly the speech was meant to prepare the public mind for the enunciation of some government policy not yet disclosed. The Minister quoted the Commonwealth statistician as showing that there were 1647 strikes in Australia during the years 1914–15–16–17; and he said that the hopes of the framers of the federal constitution, in inserting the provisions under which the Court has been created, have been disappointed. Of course it is not the practice to treat police as useless because order is not always kept in the streets, or to treat criminal courts as useless because there are still crimes. But let the challenge be accepted as it stands. So far as can be traced only three of these 1647 strikes occurred in disputes that could possibly be entertained by this Court. It is not quite clear as to the third, but I give to the opponents of the Court the benefit of the doubt.

The Court is empowered to deal with such disputes as extend beyond the limits of any one state; and before the Court was created there were many strikes in such disputes. Even from 1904, when the Court was created, up to May, 1919, there were only three disputes at the most within its jurisdiction that were accompanied by a strike — partial or general. It is true that there was another, a very serious strike in 1917, and that it extended, as a "sympathetic" strike, beyond one state; but as the dispute was between engineers employed by the state railways of New South Wales and the New South Wales government, and as, under the accepted law, this Court could not touch the state railways, the dispute was outside its jurisdiction.

The greater the existing unrest, the more remarkable do these figures appear. In article II, I have disclosed the circumstances of two out of the three strikes. Yet a Minister for labour in Great Britain (Sir Robert Horne) said, a few months ago, that the Act is an admitted failure. I do not know where he got his information; perhaps from newspapers, perhaps from the speech of the Minister. At all events, the eyes of the public have been opened by the publication of the figures; and the speech of the prophet has ended in a blessing instead of a curse.

But apart from these telling figures there have been, to my personal knowledge, many cases in which strikes would have occurred but for the influence of the Court. It is quite a common thing for the officers of a union to restrain their members from strike on the ground that the claims are to be brought before the Court, and that the Court will not deal with them if the members strike to obtain what they seek from the Court (as in the coal miners' strike mentioned in article II). For the Court refuses to exercise its powers (at the instance of the union) under the pressure of strike. There is then no guarantee of resumption of work unless the Court grant just what the union asks; and the Court refuses to act under such constraint. But of the number of strikes that have been averted through the influence of the Court no record is kept. Since May, 1919, however, the number of strikes in disputes which the Court has power to handle has increased. There was, first, the seamen's strike, May to August, 1919; then the marine engineers' strike; and now (July, 1920) the gas strike. The facts of these strikes are worthy, each, of separate study.

I include the seamen's strike, although it now appears from a decision of the Full High Court that the dispute as to wages and most of the conditions was not within the jurisdiction of the Court of Conciliation at all; for the parties were at the time under an award whose term had not expired. But as the dispute was at the time believed to be and treated as being within the jurisdiction, I include this strike in my list. The men were excited by the exceptionally high rates granted in Great Britain and in the United States as a consequence of the war. Australian seamen had prided themselves on being the best paid in the world, and now found themselves left in the rear. They did not stay to consider that the cost of living had increased far more in Great Britain and in the United States than in Australia; according to the latest figures of the statistician, the increase in Great Britain since July, 1914, is 133 per cent; in the United States 96 per cent; in Australia 63.5 per cent. They did not stay to consider that the increase in rates was largely due to the risk from submarines. They did not stay to consider that the enormous increase in American rates was due to the efforts made to find competent men for the new merchant fleet of the United States. In Australia the government was, for the time, the principal shipping employer; for under the exigencies of war the government had purchased

many ships, and had also taken over on charter, on a tonnage basis, nearly all of the Australian interstate ships and crews, but on the condition that any increases in wages should be borne by the government. So the union approached the government controller, in April, 1919, with demands for increased rates and other matters. The controller refused to grant any concession; and the men left the ships. Then, and not till then, the controller asked the President to call a conference. Having called it, I found that the men were directed by leaders who had come from other countries and who were not familiar with or favourable to our Australian methods. One of the leaders, a man from Jersey, waxed indignant because the Court had not, in its previous award, granted provisions for better accommodation for the men, and was much perplexed when told that the Court could not have granted what had not been claimed. These leaders, coming from other parts of the world, believed in direct action — compulsion by strike; the Court was a mere capitalistic device, etc. The men were not to go back to the ships until they got what they wanted. The President refused to refer the matter into Court for consideration until the men returned to the ships, as the Court could not act freely under such conditions. The distress caused to the public by the stoppage of the ships can easily be imagined. The government, it was said, must do something; so a federal Minister held a private conference with the leaders, and, on the men returning to the ships, immediately announced that he had granted concessions. The concessions included the full increase in rates that the union sought. Each A. B. got £14 per month (in addition to keep); each fireman, £16. No reasons were given.

It is easy to purchase peace in this way — for a time. But in granting the concessions the Minister did not provide for the other ratings in the ships — the officers, the marine engineers, the cooks, the stewards. He did not treat those who had not struck as well as those who had. The effect was soon apparent. The marine engineers struck. These are well-trained fitters who pass examinations in theory and in practice; and, having the control of the firemen in the stoke-hold, they have always been paid higher rates. But now the junior engineer found that the fireman who was under his orders got £16 per month, whereas he himself got only £15.10. It so happened that the Full High Court had just decided that a union which is under an award whose term has not expired could get no

relief from the Court of Conciliation; and the engineers were under such an award. They had no remedy but strike; and they struck. They imitated the seamen; and by strike the junior engineers were successful in getting from the government £19 per month, instead of £15.10. When the seamen returned to the ship, the stewards, and others, were also thrown out of work by the seamen's action,—refusing to sign the ship's articles again unless they got proportionate concessions; and they got them. The masters and officers also insisted on proportionate concessions, and they would have struck but for the Prime Minister promising, at the last hour, to give them.[2] The charter party was terminated by the government in April; the shipowners have now to carry on business as best they can; and the Court has to try to bring order into the chaos created by the government. For the other unions are quick to understand what really has happened.

As for the Gas strike the trouble is just over. In December, 1919, the members of the union employed by the Metropolitan Gas Company of Melbourne struck for higher wages. The dispute was not within the competence of the Court, for it did not extend to any other state; but after three or four days the Premier of the state, fearing that the city would be left in darkness, called the leaders to confer with him. The result of the conference was that the company granted increased rates, and proceeded to increase the price of gas. December was a summer month; and the union was emboldened to try the effect of a threat to strike in winter. Most of the poorer classes use gas for light, for heat, for cooking. In May last the union presented a huge log of demands to the principal employers in several states, including demands for higher wages, for a limit of 40 hours' work per week, etc., etc.; but the union wanted certain immediate concessions as from the 30th of April. There was fair reason for asking for immediate concessions if we assume that the claims were fair; for it had been decided by the Full High Court that, under the Act, an award if made could not cover the full time to which the dispute related, but only the time subsequent to the award. The Gas companies of Melbourne and suburbs offered several concessions, including a higher basic rate all round, and (at my instance) higher secondary rates, and a weekly hiring instead of a daily hiring. But the union insisted on a still higher basic rate, and struck for it

[2] March, 1920.

in Melbourne. The rate granted in December exceeded that to which the official statistics then pointed; and the rate offered in May exceeded it still further. Most of the employers who are parties to the dispute in the other states are municipalities who supply gas to the residents; and any rates that wealthy companies may safely grant must react severely on the small municipal undertakings. The union held out, however, and tried to get a special "tribunal" created by the Premier of Victoria to decide whether the men should get all that is claimed for the mean time, and not only the greater part of it. Of course, the union would like a special tribunal which is to confine its attention to the difference between that which has been offered and that which is claimed. It would stand no risk of losing, and it might gain something more — even as a bee, taking all that it can get from one flower, passes on to the next. Such is the result of letting men cherish hopes of a supplementary tribunal, which in order to get temporary relief for the public is constrained to yield anything that will put an end to the strike — and thereby foments more strikes. The practice of creating, or purporting to create, special tribunals originated with the federal government in the coal case of 1916, and the gas union thought it could force the state Premier, as the federal Prime Minister had been forced, to appoint such a tribunal. But fortunately the state Premier (Mr. Lawson) saw the folly of the course proposed (as well as the unconstitutionality), and firmly refused to comply with the union's request; and after about seven weeks of strike the men have just returned to work on practically the same terms as had been offered before the strike. Certainly they have gained nothing that they could not have gained if they had never struck work at all. All the suffering which they inflicted on the public as well as on their own families has failed to produce any favourable result. It has been a sad and bitter lesson, but it will aid the methods of reason as against the methods of force — of strike. The union wants now to have the whole dispute referred to the Court.

It is hardly necessary to point the morals to be derived from the facts of these strikes. An employer is unwise as well as unjust if, when yielding to strikers, he does not give as handsome concessions to those who have not struck. Due proportion must be maintained between the several ratings or classes in any one industry, and, indeed, between different industries. To purchase present

relief from strike pressure by tampering with the balanced system of the legitimate tribunal invites further strikes. The more you yield to strikes, the more strikes there will be. It is not only illegal, it is an encouragement of strikes to create or purport to create a special tribunal to overrule the legitimate tribunal. "Nothing can be more injurious to the steady prosecution of the industries required by the public than to concede to a party dissatisfied with an award, a new tribunal specially appointed to override the award, or even to decide as to the propriety of the award."[3] An executive government, from its very nature, is the worst arbiter or intermediary that can be conceived in industrial disputes.

(2) But how far have the conditions of the workers been improved by the Court?

There appeared in the *London Times* weekly of 5 March, 1920, a communication from a special correspondent in Australia. It said:

"There is much discontent too with the whole arbitration system, which official labour roundly declares to be a failure."

The Registrar brought this statement under the notice of Mr. Grayndler, the General Secretary of the Australian Workers' Union, the largest union in Australia, the union which has been the backbone of the official labour movement; and Mr. Grayndler wrote:

"The statement in the *London Times* of 5 March, 1920, *viz.*, 'That there is much discontent too with the whole arbitration system, which official labour roundly declares to be a failure,' is quite contrary to facts. There has not been any such declaration by official labour, and by far the majority of the unions of Australia favour arbitration.

"As General Secretary of the Australian Workers' union, by far the largest union in Australia, comprising 102,000 members, I can say that my union is a strong supporter of the arbitration system. Whatever shortcomings or troubles that exist or arise, are due to the limitation of the Act itself and not to the system. Many of the defects in the Act could be remedied by legislation, and if the defects were removed or the powers of the Court enlarged the arbitration system will prove a great gain to the nation as a whole.

"The unions which have favoured the arbitration system still continue to do so, and are strongly of opinion that it is infinitely better than

[3] Waterside Workers' Tribunal case, 1920—not yet reported.

the method of direct action, which, after all, very few of the unions have adopted.

"The results however obtained by the unions which have followed the arbitration system, during the last ten years, are far better than anything gained in Australia by direct action. . . ."

This statement is, at the least, explicit. The shearers in the wool industry formed the original nucleus of this union; they are piece-workers; and they have had their rates raised from 20s. or 18s. 6d. per 100 sheep in 1907 to 30s. per 100 in 1917; and the attendant shed hands, cooks, woolpressers, etc., have also gained proportionate increases. The conditions of living and working for these seasonal workers while on the sheep stations have been made far more worthy of civilized men. As for the permanent hands — the "station hands," who assist the pastoralists on the property throughout the year, their wages have been lifted from 20s. or 25s. with keep to 48s. with keep, and to 72s. per week without keep under the last award.[4] Family life on the station has been encouraged by the award; for if the employer provides a residence, etc., he is allowed to deduct the value from the wages. The value has to be fixed with the consent of the union or of a board of reference. I have trustworthy information showing that men of a much better class than heretofore apply for employment as station hands, as a consequence of the new conditions.

This union has under its shield also the fruit pickers and others who work in the orchards, the wheat lumpers, and all kinds of employees who work in the country; and their positions have been much improved by the Court.

But let us consider the advantages gained through the Court by the seamen, firemen, and other seafaring men — probably the most helpless, the worst treated of all workers. Being always on the move, always dispersed, they have not been so able to combine as others for the improvement of conditions. The A. B. seamen have had their rates raised by the Court from £7 per month in 1911, to £12.5 per month in 1918 — 75 per cent; and the other ratings have been raised proportionately. The Court has applied to seamen, firemen, engineers, officers, the principle of the eight-hour day at sea and in port — a privilege never previously conceded to seamen, I understand, in any part of the world. Not only has the eight-hour day

[4] Shearers' case, 11 Com. Arb. 389 (1917).

been granted, but the men get five days off per month (to compensate for lost Sundays or holidays), either in their home port or other suitable port. For every such day not granted, the men get double rates. They also have gained, from the Court, annual leave of fourteen days per annum on full pay. The marine cooks and stewards have made similar gains through the Court, although their hours cannot be regulated on exactly the same lines.

It would be impossible, without a long and laborious analysis of the awards, to give any adequate summary of the benefits which the employees have obtained through the Court; but I may state a few more which occur to me. When the Court came to deal with stokers at furnaces, and with other men engaged in continuous processes, these men had to work seven days per week, year in, year out; now, they work only six days, under rotation schemes. Men working in retort houses now get a week's annual leave on full pay. In clothing factories and shops, girls and women have had their hours reduced by the Court from 48 hours to 44 per week; and, for practical reasons, the men have to enjoy the same reduction. Females get the same minimum rates as men, when in competition with them.[5] Workers are allowed to form such associations as they think fit.[6] Full craftsmen are protected from unfair competition with low-paid machinists.[7] Weekly wages have been substituted for daily or hourly, wherever possible.[8] Workers have to be paid for all time of duty, whether the employer has work for them in all such time or not.[9] By a system of averaging their actual hours of employment casual workers get a full living wage; for "they also serve who only stand and wait."[10] The basic or living wage is computed and awarded on the principle that a normal man has a family and must earn sufficient to support it. Nor is the basic wage confined to the money necessary for the main requisite of life, — food, shelter, clothing; it allows something "to come and go on." The wage is based on civilized conditions — "the normal needs of the

[5] Fruit case, 6 Com. Arb. 61 (1911); 13 Com. Arb. 171 (1919).

[6] Liquor case, 12 Com. Arb. 652, 654 (1918).

[7] Coopers, 12 Com. Arb. 427, 439 (1918).

[8] Glass Founders case, 12 Com. Arb. 478, 486 (1918); Ship dockers, *ib.* 623 (1918); Gas, 13 Com. Arb. 454 (1919); Coopers, 12 Com. Arb. 427, 443 (1918).

[9] Coopers, 12 Com. Arb. 427, 444 (1918); Waterside Workers, 13 Com. Arb. 620 (1919).

[10] Waterside Workers, 13 Com. Arb. 603 (1919).

average employee regarded as a human being, living in a civilized community." That wage as originally granted in 1907 lifted the standard of living for the poor; and in the recent troublous years it has followed closely the increase in the cost of living. Nor is the gain slight that men can improve their working conditions without stopping work or threatening to stop it — without punishing themselves and their dependants, and the community.

The Standardizing of Conditions

(3) Even employers are at last beginning to recognise the advantages derived from the existence of an impartial tribunal, such as the Court, so far as it reduces to system and order the conditions under which human life can be used for the purposes of industry. Recently, the Metropolitan Gas Company of Melbourne published a statement as to the value of minimum rates of wages being fixed by such an authority — a statement which would certainly not have been made when the gas employees first came before the Court and the company was doing all it could to crush the infant union:

"It must be apparent that employers generally, and the controllers of public utilities in particular, must have the guidance of some constituted authority to establish rules governing the fixation of the basic wage, and that once a principle is adopted it should be adhered to until some better method is found. . . . It has been claimed by the worker that the Arbitration Court is not an ideal tribunal; but it must be admitted that up to the present it has been of inestimable benefit to the employees."

Some directors of big undertakings, such as the Metropolitan Tramways trust, have actually agreed to vary the rates from time to time according to the system adopted by the Court. Frequently — more frequently than ever before, and as to other conditions as well as to wages — the union and the employers, after a study of the system adopted by the Court in analogous cases, make an agreement without any hearing, and the agreement is certified by the Court and filed, and thereby becomes an award.[11] It is also quite common now for the parties to ask the decision or guidance of the Court on a few main subjects in dispute, and then to agree as to all the other items — even hundreds of items — in the light of the

[11] § 24.

Court's findings; anticipating the application of the Court's principles. For instance, in the Clothing case,[12] there were 485 employers respondents to the plaint. There were 1065 claims as numbered (many more if the subdivisions of the claims were reckoned) of which 987 related to piece-work rates. The respondents who appeared concurred with the union in asking the Court to decide as to the basic rates for adult male and for adult female workers — as to the maximum hours of work, as to the propriety of a distinction in the rates for "order" goods, and for "chart order" goods, and as to two or three minor matters. The Court acted on the request, gave its decision, and the parties who appeared signed an agreement as to the other matters. Then the problem arose as to the respondents who had neither appeared nor signed. The Court treated the terms to which the signing respondents had consented as being fair terms for the other respondents also (in the absence of evidence to the contrary), and awarded to the same effect against the respondents who had not signed. A similar course was adopted in the case of the liquor trade.[13] Again, as to the pastoral industry, the Court had made an award in 1917, prescribing rates and conditions for the many hundreds of respondents cited by the union. As it was pointed out that there were other pastoralists who had not been cited, the union undertook, at the instance of the President, to make similar claims as to these others. When this was done, the Court threw on the second set of respondents the burden of showing that what was fair for the first set would not be fair for themselves; and the second award was made to the same effect as the first.[14]

An instance of standardising on a different class of subject is afforded in the case of the waterside workers.[15] In 1915 the Court fixed the limit of weight for bagged ore to be lifted by one man at 1 cwt.; for gagged cargo to be handled by one man at 200 lbs.; for cargo on a truck (one man) at 5 cwt.; but for a single package, 6 cwt.; for cargo on a trolley (two men) at 15 cwt. All parties now concur in approving of the limitations as preventing much friction. When the matter came before the Court again in 1919, none of the

[12] 13 Com. Arb. 634 (1919).
[13] *Ibid.*, 43 (1919).
[14] Pastoralists' Anderson case, 13 Com. Arb. 364 (1919).
[15] 9 Com. Arb. 293 (1914); 13 Com. Arb. 614, 622 (1919).

parties asked for any change; and the limitations are accepted even where the award does not bind. It is also well worthy of notice that on state wages boards and other tribunals appeal is constantly made to the standards prescribed by the Commonwealth Court and to the reasoning of this Court as appearing in its series of reports.

Now it is quite true, as some workers say (according to the Metropolitan Gas Company's statement in the passage quoted), that "the arbitration Court is not an ideal tribunal." It could be made much better, more beneficial to all parties and to the public, if Parliament were to adopt the improvements which are recommended by experience. I mean to refer to some of them hereafter. But all who have experience in the control of industries will recognise the immense advantage it is to the working of the industries to have definite rules laid down by some constituted authority for guidance — not only as to the basic wage, as the gas company stated, but as to other matters — always provided that the authority does not interfere with the discretion of the management rashly or stupidly.

During these last few trying years Australia has found the advantage of having set standards as to employment in industry, and of having a tribunal ready and willing to apply these standards, and of providing a means whereby employees can get justice without the cruel and self-punishing device of strike; for, though we have our troubles, we have been free from such wide-spread stoppages and disorders as have occurred in Great Britain and in America.

Minimum Rates

As has been explained in the previous articles, the Court fixes the minimum rate by first finding what is called the "basic wage" — the reasonable living wage for an ordinary adult labourer — and then adding the "secondary wage" — the additional sum that in practice is paid to a man for the skill or other exceptional necessary qualifications of his class.

In finding the basic wage the Court uses a rough estimate which it made in an inquiry in 1907 as to "fair and reasonable remuneration";[16] and the Court varies the 7s. per day, 42s. per week, as then estimated, in the ratio that the cost of living has increased since

[16] 2 Com. Arb. 1 (1907).

1907. For instance, if it now takes 30s. to purchase as much as could be purchased in 1907 for 17s. 6d., the basic wage is found by this formula:

17s. 6d. : 30s. :: 7s. : 12s.

The latest figures for Australia as a whole seem to give 12s. 9d. per day, 76s. 6d. per week, nearly £200 per annum; but the trend of the cost of living is still upwards. Effect is given, as far as possible, to the differences in the cost of living in different localities.

The estimates of the Commonwealth statistician as to the variations in the purchasing power of money are made on scientific lines; and although often attacked on both sides by men who keep their minds fixed on the variations of some specific commodities, such as clothing, they have always stood every test. But there is no doubt that the rough estimate made by the Court in 1907 ought to be superseded or revised by a new investigation made after so many years have elapsed as to the absolute present cost of living. I had hoped — and suggested — that the government would see fit to commit the investigation to the Commonwealth statistician and his staff, as they would handle the subject coldly and impartially, aided by their experience and facilities. But the government has seen fit to entrust the ascertainment of a fit basic wage to a commission consisting of some representatives of the employers and some representatives of the employees, with a distinguished lawyer as chairman. Such an inquiry, in such an atmosphere, must inevitably elicit evidence of a rambling kind on both sides, and representatives tend to become partisans. But we must hope for the best.

The basic wage is to be fixed on family lines, on the assumption that the male adult worker has to support himself, a wife, and three dependent children. This is in accordance with the assumption of the Court in 1907; and it is also in accordance with the United States Bureau of Labor and Statistics, December, 1919. Mr. Seebohm Rowntree in England, in his thoughtful study of the subject, "The Human Needs of Labour," has worked on the same lines. He says, as to the families of all classes in the city of York, that "if we were to base minimum wages on the human needs of families with less than 3 children, 80 per cent of the children of fathers receiving the bare minimum wage would for a shorter or longer period be inadequately provided for, and 72 per cent of them would be in

this condition for 5 years or more." He even recommends a scheme whereby the states should supplement the minimum in the case of larger families. The Deputy President, Powers, J. (now resigned), has made a recommendation recently to the same effect.[17] But in determining the duty of the employer to his employee the Court does not compel a basic wage calculated on more than three dependent children.

It has been urged — and fairly — that if the workers are never to get an increase in wages unless the cost of living rise and in proportion to the increase in the cost, they never get an improvement in their real wages at all — wages as represented by the commodities purchasable therewith. Of course it is in itself a great advantage that by the system of increasing the money wages in proportion to the increase in the cost of living the standard of life is not lowered — is maintained throughout these critical years. The increase in wages made by the Court is far greater and steadier than could have been achieved by strikes. But the Court has done more. By a curious piece of good fortune, the standard of life was actually raised *at the beginning*, before the application of the statisticians' figures; and the raised standard — not the previous standard — has been upheld in the long series of awards. For the very first case that came before the present President was a special inquiry in which the President had to decide (for the purpose of an Excise Tariff Act) whether certain manufacturers were giving "fair and reasonable remuneration" to their employees; and he had to make up his mind what was fair and reasonable. His conclusion was that a wage of 7s. per day, 42s. per week, was the least wage that would be sufficient for wholesome living in Melbourne, and the manufacturers were not paying so much. The wage at the time for the labourer was 5s. or 6s. per day. I think that I am close to the mark when I say that even for men in regular work the average wage was not more than 5s. 6d. per day, 33s. per week. This would mean that the standard was raised by over 27 per cent in 1907; and this raised standard has been preserved in the succeeding awards, which prescribed increases proportionate to the increase in the cost of living.

The system is now, apparently, universally accepted as just and proper. It will amuse some of my readers to know that the

[17] Metalliferous mining, 13 Com. Arb. 550, 559, 572 (1919).

Court was for some years the target for numerous attacks on the ground that the Court was itself the wicked cause of the increase in the cost of living. Worried housewives were diligently instructed by certain journals that the Court was to blame. They were also taught the "vicious circle" theory — the fallacy that an increase of wages is no real benefit to the worker — that (for instance) an increase in the wages of a worker in motor-car bodies involves an equivalent increase in the price of his bread and meat. But since it became generally known that the cost of living has risen in other countries as well as in Australia — indeed, much higher than in Australia — there seems to be silence at last on this subject of the wickedness of the Court.

Secondary Wage

But the secondary wage — defined as above — has to be added to the wage suitable for the unskilled labourer. The Court holds that the inducement to acquire the extra skill of the artisan must be maintained. For the purpose of ascertaining the secondary wage, the Court looks to the margin allowed for the special calling in practice before regulation; and both employers and employees willingly acquiesce in this system.

During the violent financial upheaval caused by the great war, and because of the widespread uncertainty as to what would follow, the Court has not increased the secondary wage in proportion to the increased cost of living; it has merely maintained the same absolute margin.[18] True, the additional commodities to which the skilled worker is entitled have increased in price also; but they are not so absolutely essential as the commodities necessary for wholesome living. Now that the war has ended, the question arises whether this cautious and conservative course should still be followed; but as the subject is to be discussed at an early date I refrain from further comment.

Minimum Rates and Scarcity of Labour

In fixing minimum rates, the Court refuses to prescribe such rates as a temporary scarcity of the class of artisans or others enables the men to secure. For instance, fully qualified coopers are

[18] Merchant Service Guild, 10 Com. Arb. 214 (1915).

scarce — for various reasons; and high-class breweries are willing to give coopers higher wages than the system adopted by the Court would justify as a minimum — that is to say, the basic rate with the addition of the appropriate secondary wage for training and skill. This seems to be a proper case for the play of the forces of demand and supply. If the rates due to a temporary scarcity were to be prescribed as the minimum rate, there would be unrest produced among artisans of the same grade as to whom there is not such scarcity; and, when normal times return, there would be complications also in the employment even of coopers.[19] As stated in the Waterside Workers' case,[20] a minimum rate "means the least rate which the employer shall be allowed to pay, on pain of a penalty, whatever the state of the market for labour, or the need of the employee for work, whatever his efficiency and whatever the circumstances — agreeable or disagreeable." This does not prevent the Court, however, from prescribing, or creating machinery for fixing, a lower rate for workers who are old or infirm — in obedience to § 40 (1) (b) of the Act.

A similar problem arose in the case of seafaring men of various ratings. Owing to the risk from submarines, and other causes which I have already mentioned, the rates offered to these men in other countries were hugely enhanced; and the Australian seamen and firemen claimed in 1918 50 per cent increase in their minimum rates. The Court refused to depart from its systematic standard for the minimum, but suggested the offer of a bonus under the exceptional circumstances:

"It may be that the Australian shipowners may have to outbid America by the grant of bonuses or otherwise, in order to retain seafaring men settled in Australia. It is obviously no more an offence for an Australian seaman to ship from non-Australian ports in order to get the benefit of the higher wages than it is an offence for a merchant to sell his goods in the highest market."[21]

But the suggestion was not heeded. The government had many ships of its own, and had nearly all the interstate ships under charter. It did nothing, and allowed things to drift to the strike to which I have already referred.

[19] Coopers, 12 Com. Arb. 427 (1918).

[20] 13 Com. Arb. 608 (1919).

[21] Seamen, 12 Com. Arb. 752, 756, 757 (1918).

Offensive and Other Jobs

Closely allied to this subject is the subject of attempts made by unions to get extra minimum rates prescribed on the ground of the job being dirty or offensive, or risky to life or health. I have dealt with this matter in both the previous articles, and I do not want to repeat myself. But the position taken by the Court is well illustrated by a recent case as to gas-works employees. Time and a half rates were claimed for "men demolishing retort benches in close proximity to hot retorts," for "coal trimmers in fiery bunkers," for boiler cleaners. Extra pay was asked also for men working in dust or fumes, for men cleaning acid tanks, for men working at a height of 20 feet (6d. more per day), of 40 feet (1s. more per day), of 100 feet (1s. 6d. more per day), and for men working over a permanent floor or staging less than 6 feet wide — whatever the other circumstances. The Court said:

"The risks involved may, of course, enter into a bargain for rates, but they are not to be considered in fixing minimum rates. Nor is it well, in the interests of the community, that employers should be encouraged to think that the Court sanctions the putting of human life in danger if certain extra rates be paid. Such rates encourage slovenly management, and indifference to the men's safety. It would be much better for the union to ask for some regulating conditions which would prevent or diminish the risks involved. If such regulating conditions are impracticable, it might be more appropriate to ask for a reduction of hours than for increase of wages." [22]

It was shown that a Victorian wages board had prescribed a higher rate for men working at a temperature of 130 degrees Fahrenheit. This had, at all events, the merit of definiteness — a merit which the union's claim had not. But it left the men working at 129 degrees or 125 degrees to the ordinary rate; it would tend to raise disturbing contrasts, and provoke unrest.

Excessive Men

The Court refuses to grant claims made for an unnecessary number of men for a job, where the object of the claim is merely to reduce unemployment. For instance, the Waterside workers

[22] Gas, 13 Com. Arb. 455, 456 (1919).

claimed that there should be six truckers at every hatch, six men in the hold or on deck of every vessel, two stackers and two gangway men for each hatch. Admittedly, the object was to compel the owners to employ more men; but more men were not usually necessary — in some cases they could not even be used. The Court cannot solve the problem of unemployment in this way. It is not fitted to manage a business concern, and will not interfere with the discretion of the employer as to the speed at which he wants to get his work done.[23]

Weekly Hiring — Casual Employment

The Court holds that hiring by the day is better than hiring by the hour; and that hiring by the week is better than hiring by the day — wherever practicable.[24] Weekly wages fit in better with considerations of subsistence, and tend to greater steadiness in the prosecution of the work required by the community. Casual work, at hourly hiring, involves much waste of time and available human energy, and is injurious to the morale and physique of the workers. I have referred in both the previous articles to the case of the waterside workers, hired by the hour. These men, it is held, serve the employer and the public not only by actual work, but by waiting in readiness for the ships to come, and they must be provided with a living wage. To be more definite, the Court sets itself to find, as well as it can, the average receipts of the average man — the man of average competence, who takes work in this industry and in no other, who works or seeks work every day at the wharves. Having found that he averaged 30 hours per week, the Court prescribed 2s. 3d. per hour, which means 67s. 6d. per week, for 30 hours' actual work.[25] This is as near as the Court can go to a weekly wage for this average man. There is as yet no sign of organization among the employers such as would give full time of work every day at weekly wages. The principal difficulty arises from the needs of overseas ships, as there are long intervals between their visits to our ports.

[23] Waterside Workers, 13 Com. Arb. 614–615 (1919).

[24] Ship dockers, 12 Com. Arb. 623, 628 (1918); Gas, 13 Com. Arb. 454 (1919).

[25] Waterside Workers, 13 Com. Arb. 604, 606 (1919).

PIECEWORK *vs.* TIMEWORK

Some unions will not submit to piecework at any price; some insist on piecework. Some theorists fancy that piecework, with its higher rates for greater speed of output, is a solution for all labor difficulties; but they are mistaken. The matter was elaborately discussed in a dispute between the Amalgamated Society of Engineers and the Commonwealth government.[26] The Prime Minister, being anxious to get ships built at the greatest speed in the exigencies of the war, insisted that every union concerned in his shipbuilding scheme should agree to submit to piecework if required, or be excluded from employment. This union refused to make such an agreement, and brought the dispute before the President. The Court held that the refusal was justified. The expert managers of the shipyards admitted that they did not want to put men of this occupation on piecework rates; they knew piecework to be inappropriate in such an occupation, where there is little or no repetition work and the worker has to apply his mind afresh from job to job. On the other hand, the Court refused to interfere with piecework rates, refused to award timework in the place of piecework, in the case of coal lumpers. It will hardly be believed in other countries that mechanical appliances have not yet been substituted for human labour, in a port so important as Melbourne, for the dirty and monotonous carrying of coal in bags into and from ships.[27] In the case of wheat lumpers on piecework rates, it was prescribed that the receipts from piecework were not to be less than 1¼ times as much as timework rates.[28] In the case of the coopers the union sought to prohibit piecework. It appeared that many of the members desired piecework for the easier operations, whereas in many breweries the employers preferred timework, as it meant greater care in the production of the casks. The Court adopted the device of committing to the appropriate board of reference the function of determining whether piecework should be allowed and for what operations and in what places, and what the rates should be.[29] This is one of the numerous cases in which it would be expedient for the Court to have power to create a shop committee for each undertaking.

[26] 12 Com. Arb. 386 (1918).
[27] Waterside Workers, 13 Com. Arb. 615 (1919).
[28] Wheat, 13 Com. Arb. 814 (1919).
[29] Coopers, 12 Com. Arb. 427, 443 (1918).

NEED FOR POWER TO APPOINT SHOP COMMITTEES, ETC.

It is not possible, in an article of this kind, to state even a tithe of the problems which are presented to the Court, still less to state the solutions which have been reached. I can only refer those who may wish more specific information to our annual reports. They will see, for instance, in the Gas case, 193 different classes of occupations to be dealt with, and 547 items in dispute — all to be considered. But I desire to say something on general subjects, such as shop committees, compulsion in arbitration, defects in the Act, special tribunals.

Frequently in disputes the union makes a claim which involves a dispute extending beyond one state, but which cannot be determined justly or fitly by imposing one common rule for all the undertakings concerned. For instance, in the Gas case[30] it was claimed that when retorts are charged by means of scoops or hand shovels the maximum number of retorts to be drawn or charged in a shift should be 12. Now it is the clear duty of the Court to endeavour to secure, where there is an appropriate dispute on the subject, that human powers must not be overtaxed; but such a regulation as claimed cannot be justly made by an Australian court for all gas works under all conditions. The work is trying at all times; but though 12 may be a proper maximum in the case of old and defective retorts, it is not a proper maximum in all cases. If there is to be regulation of the number of retorts to be charged, if the discretion of the manager, *primâ facie* autocratic, is to be limited, the regulation should be made by some man or men having the particular work in sight for the time being. As to such a matter (not as to all matters) there is much force in the statement attributed to a Minister that the tribunal should be local; but he does not realize the limitation of the Constitution or of the Act; he does not see that under present circumstances there can be no system of local tribunals, except so far as the power to appoint a board of reference can be applied. In such a case as this, a power to appoint a shop committee would be most useful; but the government does not ask Parliament to give the Court such a power. The Court has therefore been compelled to make such use as it can of its power to appoint a board of reference,[31] a power which is most unsatisfactory (as

[30] 13 Com. Arb. 457 (1919).

[31] § 40 A.

explained in article II), but which has been made use of, where possible, long before the Whitley report of 1917 was published in Great Britain. The employers in this case strongly opposed the conferring of such authority on a board of reference. Their main fear was, as expressed, "lest the board should decide managerial matters that ought to be left to those responsible for the administration."

Now this subject, the participation of employees in matters of management of an undertaking, is sure to be prominent in the coming years; and it needs careful consideration in all aspects. Lord Leverhulme has dealt with it cautiously but sympathetically. Mr. John D. Rockefeller, junior, another great employer, has expressed himself as being in favour of the representation of employees in industries. Mr. Justice Sankey and the three independent government nominees on the coal mines' Commission in Great Britain — at a time when they were not prepared to recommend nationalization — said:

"We are prepared, however, to report now that it is in the interests of the country that the colliery worker shall in the future have an effective voice in the direction of the mine."

So the matter has been lifted out of mere abstract speculation; but employers in Australia do not seem to recognize the growth of the movement towards some share in the responsibilities of management. Mr. John Dewey, in the *New Republic*[32] seems to me to hit a point of vital danger when he says that the success in the movement for better wages strengthens "the power of wage earners to make demands for a still larger share in material products without creating among them a feeling of responsibility for industry itself." They should share the responsibility for the continuity and success of the industry. They should have "freedom to participate in its [the industry's] planning and conduct." Let them be in a position to "exercise their minds in connection with their daily occupations." In my opinion, there can be no stable equilibrium in the present position — "Here is your work; there are your wages; it is not your business to discuss to what work you are to apply your powers." The position which the Court takes up is indicated in the case of the Marine engineers:

[32] May 5, 1920.

"I attach great importance to proper boards of reference for industries. They allow the discussion of grievances; they enable the employers to see the difficulties of employees, and employees to see the difficulties of employers; they supply to some extent the crying want of our modern industrial system — the absence of co-operation between the management and the employees. They often remove causes of friction before serious industrial trouble arises. Some day it will be a matter of amazement when men look back on our times and see what a wealth of experience is rejected in the working of industries. Under the stress of war in Great Britain, there are being developed industrial councils of all kinds, councils at which employees meet the management on equal terms for the discussion of the common problems of the industry; and these boards of reference should fulfil similar functions." [33]

Unfortunately, boards of reference do not completely "fill the bill." There is need of shop committees, as elsewhere suggested by the Court; [34] but there is no indication that the government has even considered the suggestion.

The provision as to boards of reference has been also applied to problems arising in connection with waterside workers. These casuals, employed by the hour, naturally expect, under certain circumstances, to be offered higher rates than the minimum prescribed, as an inducement to undertake the work. For example, a vessel arrived with her hold steamy and offensive — the vessel having been submerged after a fire, and the cargo of linseed and jute having rotted. Another vessel arrived on which there had been virulent influenza. In each case there was need for speed in discharging, but delay occurs if there is to be haggling as to the wages. The Court has provided that men who proceed forthwith with the work, leaving the rates to be settled by the union official and the foreman, or, if they differ, by the board of reference, shall be paid the rates so settled. So far, the provisions seems to work well. The work required by the country proceeds pending the decision.[35]

Compulsion in Arbitration

From our Australian point of view, the objections so fiercely urged in America and in Great Britain to compulsory arbitration

[33] 12 Com. Arb. 665, 681 (1918).
[34] 13 Com. Arb. 681 (1919).
[35] Waterside Workers, 13 Com. Arb. 610–621 (1919).

appear to be fanciful and irrelevant. Compulsion may be applied at either of two points: compulsion to submit to arbitration before strike, and compulsion to obey the award. I do not know how far compulsion goes in the Norwegian act, or in the recent statute of Kansas; but so far as I understand from a journalistic statement as to the effect of a bill laid on the table of the French Chamber of Deputies, it is the former kind only of compulsion that is proposed to be applied in France, even in the case of gas and other public utilities. I may be wrong, as I have not seen the bill. Under the Australian act, both kinds of compulsion are applicable; and no voices, so far as I know, are now raised against either. Regulation by tribunals of some sort is accepted; it is welcomed especially by the unions — the great majority of the unions. In the next place, while it is quite true that well-drawn collective agreements would be, as to most subjects, preferable to awards, it is generally impossible to get such agreements. Sometimes there are thousands of respondents, often hundreds; many put in no appearance and will make no agreement. Even among the respondents who do appear, there are many who will dissent from certain proposals. If the Court has no compulsory power at all, it must very often wait in vain for universal consent. There will either be no agreement at all, or the agreement must be on the lines dictated by the most obstinate. With compulsion in the background, the agreement will be on the lines which the reasonable employers favour. Under the Act, the first duty of the Court is to try to get agreement; and only if and so far as it cannot get agreement as to a claim to award. The ideal of the Court is to get such a regulation as the parties ought to put in a collective agreement; and compulsion means merely that as to claims on which the parties cannot agree, or as to which some of the parties will not agree, the Court can make an award. Very often the mere fact that the Court has a power of compulsion in reserve impels the parties to find a line of agreement; and reasonable employers are more willing to make concessions when they feel that their competitors are to be bound by the same terms. In the analogous matters of protecting workers from dangerous machinery, of providing compensation for accidents, of limiting the hours for children's work, there could have been no relief if the workers had to wait for universal agreement on the subject; and legislatures have had to make such matters the subject of direct coercive enactment.

Moreover, as stated in article II, the dread expressed by certain theorists that compulsion would end in "a servile state" — a state in which the workers would be compelled to work in return for certain guarantees as to conditions — is unfounded, so far as our experience goes. It has been established here that a worker is not compelled to take work, any more than an employer is compelled to give work. From the nature of the case, the compulsion of an award is nearly always exerted on the employers. For, as the employers have had, until lately, by far the stronger economic position for bargaining, the employers do not (except very rarely) seek the protection of the Court. The employees seek it, and take good care not to claim protection against themselves.

Defects in Act

The experience of the Court during some fifteen years of existence shows that the Act under which it works is very defective. This fact is not surprising, for the experiment is novel. For instance, there is the defect to which I have already referred, that the Court cannot appoint shop committees or industrial councils. Even the power to create a board of reference is defective. The Court is empowered to create a board to deal with any "specified" matter which under the award may require to be dealt with, but it has been held by the Full High Court that the Court must "specify" each difficulty to be dealt with before it knows what difficulties will arise.[36]

Another thing: the Court has no power to enforce its own awards. Parliament purported to confer this power; but according to a decision of the Full High Court the provision is invalid because the President has not a life tenure in his office.[37] The enforcement of awards is held to be part of the judicial power of the Commonwealth; and it is held that, under sections 71, 72, of the Constitution, no judge can exercise that power unless he has a life tenure. There is this curious result, that proceedings for enforcement come before police magistrates who have usually a tenure at the mere will of the Executive. When I say that the parties strongly desire that the Court of Conciliation should itself authoritatively enforce its own

[36] See article II, 32 Harv. L. Rev. 189.

[37] Waterside Workers *v.* Alexander, 25 Com. L. R. 434 (1918).

awards, I desire not to be understood as reflecting in the slightest way on the police magistrates. But I say that the more confidence the parties can feel as to the enforcement of awards (or agreements deemed to be awards), the more they will favour the settlement of their disputes by or through the Court, and the less will they heed those who incite to strikes. So strong is the preference for the Court, that the President is frequently asked by both sides to say what ought to be done when some difference arises, both sides agreeing to carry out his decision, whatever it may be.[38] Even where employers are not bound by the award, they sometimes ask the President's ruling with regard thereto. The state wheat board of New South Wales had just secured a decision from the Full High Court to the effect that the Court of Conciliation had no power to bind the board, being a government agency, as to its operations; but as the board could not get waterside workers to offer themselves for work except under the conditions of the award, it asked the Court to decide a doubtful point. The President decided it, in order to aid the board.[39] The Court has publicly stated that this power to enforce should be given, but the federal government has not stirred.

Again: it has been held by the Full High Court that under section 28 of the Act there can be no new dispute entertained by the Court of Conciliation during the specified period of an award, on a subject which has been dealt with in that award — even though quite new circumstances have arisen, though the actual claims in respect of the subject are different, and though there are parties to the new dispute who were not parties to the old dispute. Even if, since the award was made, the cost of living should have unexpectedly increased by 100 per cent and new claims made, the Court can give no relief; the employees must be left to the old way of seeking relief by strike.[40] Moreover, when the court, after the expiration of an award is in a position to make a new award, it cannot make the new award apply to the whole time of the actual dispute — *e. g.*, if increased rates be granted they must not apply to the time before the new award is actually made. Before this ruling was given, the Court was frequently able to get the men to offer for work, to continue the

[38] *E. g.*, 13 Com. Arb. 178, 194 (1919).
[39] Waterside Workers, 13 Com. Arb. 176 (1919).
[40] Gas, 27 Com. L. R. 72.

operations required by the country, by assuring them — generally with the consent of the employers — that the new rates would apply as from the beginning of the dispute. Such an assurance was a potent aid to continuity of operations; but it cannot now be given. The deputy-president as well as the President has called public attention to the crying need for an amendment of section 28; and the Full High Court has strongly recommended the Government and Parliament to give attention to the subject. But all the appeals are unavailing.

Further: it is of the utmost importance that the expense incidental to proceedings before the Court should be reduced as far as possible. Those who favour "direct action," the weapon of strike, are continually pointing to the expense of seeking relief through the Court. The main item of expense is that of bringing witnesses from long distances, and of keeping them until they have given their evidence. Lawyers are usually the scapegoat when people complain of expense; but, inasmuch as in the hearing of a dispute lawyers cannot appear except by unanimous consent, lawyers' costs do not usually affect seriously the aggregate of expenditure. But much expense could be saved if a separate application to the High Court to decide as to jurisdiction were made unnecessary. In 1914, Parliament certainly did service to the objects of the Act by putting an end to the practice, previously so common, of parties fighting the union on the merits, and then, if dissatisfied, applying to the High Court for prohibition — usually on the ground that there was no "dispute extending beyond the limits of any one State." By a new section, section 21AA, Parliament provided that the decision of a justice of the High Court, on an application separate from the arbitration, should be conclusive on the subject. But in place of allowing the President or deputy-president — both of whom are justices of the High Court — to decide this point of jurisdiction when the case is called on for conciliation and arbitration, Parliament has required a separate application. Not only are there costs of lawyers on this application, but the mere expense of serving every respondent with the summons is formidable. An application has to be made for leave to substitute service by letter instead of personal service; and each letter has to be sent by post and registered. Where there are, as often there are, hundreds or thousands of respondents, the expense is very substantial. The President

has recommended an amendment of the Act; but nothing has been done.

Then the judicial staff of the Court should undoubtedly be increased. At present, there is but one deputy-president; and the two justices are unable to overtake the increasing work. Industrial disputes will not brook "the law's delay." Claims for industrial relief are so live and urgent in these times of unrest that they cannot be postponed as Lord Eldon would postpone a decision involving the application of the Rule in Shelley's case. It is encouraging to find the unions — and the employers — so eager for the Court's assistance; but the assistance often comes too slowly. In New South Wales, the industrial Court of the state has three judges; in Queensland there are two at least; yet this Court, which has all Australia within its jurisdiction, has only two — sometimes one. It may be doubtful whether the Act allows more than one deputy; if doubtful, the Act should be amended. The President has appealed for more assistance — but the appeal is apparently not heeded.

The few defects which I have mentioned are defects which could be cured by parliamentary action, and Parliament, on such a subject, has to be led by the government. The government, however, is either unable to understand the need for amendment or is unwilling to aid the Court in its efforts for the public good. I can find no other possible explanation. But an alteration of the Constitution would be necessary if we are to put the regulation of industrial matters on a thoroughly satisfactory basis. At present the state Parliaments have control of the whole subject of labour with the exception of disputes extending beyond one state; employers are often harassed by having two sets of laws, state and federal, as to labour; and in a big undertaking there are often a dozen or score of awards to be obeyed, each drawn up independently, not harmonized with the others. In the first session of the first federal Parliament a resolution was unanimously passed in both Houses in favour of entrusting the federal Parliament with the whole subject of labour; and, if I may judge the views of the Prime Minister from certain amendments of the Constitution which he submitted to the country, but which the country has rejected for political reasons, he sees clearly that this is the true goal. I feel free to say something on this subject because of an application which came before me officially under section 20 in a recent case as to the pastoralist

industry.[41] Disputes relating to shearers and shedhands have always been recognized as being peculiarly fitted for this Australian Court, and have been settled in this Court hitherto. The men move from north to south, from state to state, from pastoral station to station, as the season advances. The work throughout is substantially the same. The Queensland industrial Court, however, has this year — in pursuance of its undoubted power — prescribed (amongst other things) 44 hours per week as the maximum number of hours for Queensland stations. In 1917 the Australian Court did not see fit to depart from the Australian standard of 48 hours. It is easy to conceive the friction which this conflict of the awards creates. A shearer passing over the invisible line of boundary from Queensland into New South Wales will object to working 48 hours; and the shearers in New South Wales, Victoria, and South Australia will claim 44 hours as in Queensland. According to the newspapers, they are actually refusing to accept work except on the Queensland terms, as to hours and other conditions. Obviously, all the conditions of such labour should be subject to one final, co-ordinating Australian authority, such as would prevent invidious comparisons and unnecessary causes of discontent. In short, the conditions should be regulated on one system, though the system may allow suitable difference in detail.

This view is not at all inconsistent with the suggestion made by some federal Ministers that there should be local tribunals for local disputes. But, as the Constitution stands, the federal Parliament cannot create such tribunals — the disputes would not extend beyond one state. It is quite true that for certain points of difference local tribunals are the best — especially for such points of difference as boards of reference or shop committees might well deal with as above stated. At the same time, it has to be borne in mind that employees jealously watch any privileges which employees in other localities or other undertakings enjoy, and which they do not enjoy themselves; and it is clear that such other local tribunals ought to be subject to Australian revision. This means co-ordination to be effected by the tribunal which is Australian in its scope. At present, the unions are only too apt to treat the state and federal courts as competing shops, and they resort to the shop which is likely to grant them the most.

[41] Pastoralists, 1920 — not yet reported.

Special "Tribunals"

It is bad enough for the state and the federal Parliaments to be simultaneously dealing with the same subject of labour conditions; but there is "confusion worse confounded" when a government creates, or purports to create, novel special "tribunals." The first instance, I think, was that of the coal miners; the facts are set out in article II, and I do not feel justified in repeating here the sad story. The community was deprived of the coal it wanted, and as the President refused to arbitrate unless the Prime Minister left him judicially free, the Prime Minister appointed a tribunal which granted the miners' claims without evidence and without argument. The consequences of this yielding to strike, under the veil of a "tribunal," have been, as I pointed out in article II, disastrous; and the coal miners are now threatening a general strike unless further demands which they make be conceded.

Last year there was the seamen's strike, which I have already described. A Minister sat in private conference, and granted to the strikers all the wages they claimed, and other things. In its inception, this conference could not fairly be called a "tribunal;" for the government was, as before stated, the principal shipping employer in Australia; and an employer must always be free to confer with his employees or their union. But, as the Minister forced the other shipping employers to agree to the same terms as the government accepted, the conference became in effect a tribunal. The grave consequences of granting the concessions claimed without granting equivalent concessions to the men of other ratings who had not struck have already been stated. When the marine engineers struck, in order to get as good concessions as the seamen had got, the government then, and not till then, yielded along the whole line to nearly the full extent of the claims, but left it to a special tribunal, having an eminent soldier as chairman, to say how much of the balance of the claim should be granted. The tribunal sat; and the public have been informed that the members of the union are still discontented, as they did not get all that they asked.

Then there was the case of the waterside workers' "tribunal." The Court had refused, in 1918, to restore to the members of the union a right to preference in employment, or to restore the old practice of engagement at the wharves.[42] The employers had

[42] 12 Com. Arb. 277 (1918).

granted this preference in 1911 by agreement, but had duly terminated it in 1917 in consequence of the members having struck work in sympathy with New South Wales State Railway employees; and they also established bureaux for engagement, for the protection of the men who offered for work during the strike. The Court, finding that the work of the country was being done under the new arrangements, refused to interfere with them. The Ministers appointed a gentleman under a royal commission to inquire into the bureau system in Melbourne. It turns out now that his report was unfavourable to the abolition of the system; but in the meantime, and without disclosing the report, the Ministers announced that the bureau system was to be abolished. There is no pretence that this abolition was effected with the consent of the other shipowners. Then the Sydney members of the union pressed for a similar decision for Sydney; and the Prime Minister requested the shipowners to nominate representatives to sit on a "tribunal" which he had decided to create "with a view to effecting a settlement of matters in dispute on similar lines to those adopted in the case of Melbourne wharf workers." Some of the shipowners have objected, well knowing how such a tribunal, created *ad hoc*, would be likely to act; and the proposal for such a tribunal has, up to the present time, miscarried.

Next there is the Gas case, where the Melbourne gas employees struck work (as set out in the previous part of this article) in June, 1920. The Premier of Victoria was strongly pressed to create a special tribunal to decide as to the difference between what the Melbourne companies offered, and what the union claimed; but he has evidently seen the danger of allowing such "tribunals," and has refused to tread the primrose way which gives present ease and manifold greater troubles hereafter.

Apart from the unconstitutionality, the illegality, of such special tribunals (for the Crown, the Executive, has no power without an Act of Parliament to create novel tribunals), the practice of creating (or purporting to create) them is most unwise, most disastrous in its effects on industry, and on continuity in industrial operations. A special tribunal is really a device whereby the government tries to "save its face" when yielding to a strike. The tribunal is expected to grant the claims, just or unjust, so far as is necessary to induce the strikers to resume work. It secures present ease by

encouraging further and far greater trouble. As a child who finds that the more he cries the more he gets his way, will cry the more; so with men who strike. When Parliament provides a fair and even sympathetic tribunal to consider grievances, the government will not prevent but will actually induce stoppages, if it holds out the prospect of a second tribunal to supplement or supersede the decisions of the legitimate tribunal. If a government wanted to destroy the system of conciliation and arbitration, and to encourage unions to adopt the course of seeking remedies by holding up the community, it could not do so more effectually than by this practice of special tribunals. The proper course is obviously to watch and correct any defects in the legitimate tribunal; to make access to it easy and speedy and cheap; to take away from the employees all inducement to strike, all excuse for striking; to satisfy public opinion that for every real grievance there is a remedy on lines of reason; and never to yield anything to force, to strike.

The Amounts Involved

It is evident that some people do not yet realize the importance of this great experiment, or the responsibility which rests on those who administer the Act, and, I must add, on those who interfere with its administration. It may be worth while to consider some figures. It appeared in the course of a case that in 1918 the interstate ships alone (apart from the overseas ships and State coastal ships) paid to waterside workers about one million pounds sterling. The rates were then increased from 1s. 9d. to 2s. 3d. per hour; so it may fairly be inferred that the increase of 6d. per hour would cost the interstate shipowners £285,714 per annum more at least. In another case, that of the pastoralists in 1917, some newspaper alleged that the increases in rates prescribed by the award involved the transfer of four million pounds per annum from the pastoralists to the employees. This statement was not verified; no person stands sponsor for it; but it was repeated as if gospel truth from newspaper to newspaper, from mouth to mouth. "How shocking that any Court should have such power." But the greater the amounts involved, the greater the necessity for giving to the Court all the assistance that it needs. The truth is that the Court transfers more money and affects directly more human lives than all the ordinary Courts of Australia taken together.

Assuming it to be established that the Court has greatly aided in securing the continuity of industrial operations in these troublous and critical times, that it has produced great improvements in the conditions of the workers, and that it has largely reduced to system and standardized the use of human life for industrial processes, the question yet remains, has the work of the Court any permanency for good? At this point, many generous, public-spirited theorists part company. Some of them have come to the conclusion that the remedy for all our industrial troubles lies in some socialistic scheme in which the whole wage system is to be abolished. Now I am far from deprecating idealism. There is no aspiration, no prayer, so ennobling as "Thy kingdom come." But though we think we see our distant objective, though we look with longing for that which is great and complete, as there float to our eager senses the "murmurs and scents of the infinite sea," we cannot confine the course of human movement to the exact channel which we mark out for it. What is to be deprecated is the opposition of idealists to any channel towards the ocean that is not of their own selection. The water must and will take its own course. In industrial unrest there is much more than mere wages. If the wage system could be abolished to-morrow, everywhere, if it were just and possible for the workers to get "the whole product of labour," there would still be need for regulation of the conditions under which human life — the most valuable thing in the world — is to be safeguarded from deterioration and degradation, is to get full opportunity for the full development of its powers. Where there are more wills than one, there must come collisions of will — and disputes; and even if the directors of industry were to be elected there still would be need for regulation. Regulation has come to stay.

Henry Bournes Higgins.

MELBOURNE, AUSTRALIA, July 31, 1920.

Since I wrote this article, the policy of the government has been announced in Parliament. I have been left to the newspapers of July 30th for information as to the policy. It is proposed in the bills (*inter alia*) to create special tribunals at the will of the government; and a minister may even refer to a tribunal a question whether something that a union has failed to obtain from the Court should be granted:

> O navis referent in mare e novi Fluctus . . .
> . . . . . .
> Nunc desiderium curaque non levis.

H. B. H.